

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-001523-MR

ADEROS FRASURE AND ANTHONY FRASURE

APPELLANTS

v. APPEAL FROM BOYD CIRCUIT COURT  
HONORABLE C. DAVID HAGERMAN, JUDGE  
ACTION NO. 98-CI-00924

BOBBY WELLS; LOUISE WELLS;  
AND BOYD COUNTY, KENTUCKY

APPELLEES

OPINION  
REVERSING  
AND REMANDING  
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BEFORE: BARBER, DYCHE, AND JOHNSON, JUDGES.

DYCHE, JUDGE: Anthony Frasure and Aderos Frasure appeal from a judgment of the Boyd Circuit Court determining that appellees Bobby Wells and Louise Wells are the owners of an area of disputed property and assessing damages against the Frasures for trespassing. Because the trial court applied an erroneous standard in determining that the Wellses were the owners of the disputed property, we reverse and remand for additional proceedings. In addition, because the trial court did not apply the correct standard for awarding trespass damages, we reverse the damages award and remand for a correct calculation of damages

in the event that, upon remand, the Wellses are found to be the owners of the disputed property.

Anthony Frasure and the Wellses own tracts of property located on the opposite sides of Sheep Pen Branch, a small stream. While Anthony now owns the Frasure tract, during the time frame relevant to the case, Anthony's father, Aderos, owned the tract for a period of time. A county road, Crystal Lake Road, runs parallel to the stream on the Wells side of the stream. This dispute concerns where the line is located along the Sheep Pen Branch boundary. The controversy began when the Frasures placed a culvert in the branch and began using it as a means of ingress and egress to their property. The Wellses objected and ultimately put up a small fence as a barricade to prevent the Frasures from using the driveway. The fence was subsequently removed by the Frasures.

On September 24, 1998, the Wellses filed a Complaint in Boyd Circuit Court alleging that the Frasures had trespassed upon their property by constructing the culvert and destroying the fence. The Frasures filed separate answers. Both denied that the Wellses were the owners of the disputed property, and Anthony filed a counterclaim seeking to quiet title in the property in his favor pursuant to KRS 411.120. Anthony further sought trespass damages against the Wellses. On February 10, 1999, Boyd County was added as a necessary party to the proceedings on the basis that it may have an interest in the disputed property.

Upon motion by the Frasures, on July 2, 1999, the trial court entered an order referring the matter to the Master

Commissioner. It appears that an evidentiary hearing was never held before the Commissioner; however, it further appears that the parties agreed to have Phil Biggs of Diamond Engineering review the chain of title of the Wells and Frasure properties and, following that, to then submit the case to the Commissioner for decision without an evidentiary hearing.<sup>1</sup> On April 24, 2000, the Commissioner entered his Report and Recommendation. The Commissioner's report recommended that title be quieted in favor of the Wellses; that the Frasures be required to remove the culvert and restore the property to its original condition; and that the Frasures be required to pay, as trespass damages, the Wellses' attorney fees, surveyor costs, and court costs.

On May 1, 2000, the Frasures filed exceptions to the Commissioner's report objecting to the Commissioner's failure to make appropriate detailed findings of fact and conclusions of law in support of its recommendations; to the Commissioner's adoption of the Biggs report; and to the recommendation that the Frasures be required to pay attorney fees and survey costs. Following a hearing, the transcript of which is not included in the record, on May 30, 2000, the trial court entered an order overruling the Frasures' exceptions to the Commissioner's report and adopting the Commissioner's report in its entirety. This appeal followed.

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<sup>1</sup> In their brief the Frasures complain that the Commissioner entered his report without a hearing; however the Frasures do not cite us to their request for a hearing, and they did not raise this issue in their exceptions to the Commissioner's report. Errors which a party fails to bring to the attention of the trial court are not preserved for appellate review. Robinson v. Commonwealth, Ky. App., 572 S.W.2d 606, 608 (1978).

First, the Frasures contend that the recommendation of the Commissioner as adopted by the trial court in placing the boundary between the Frasure and Wells property as the center of Sheep Pen Branch was clearly erroneous and is not supported by substantial evidence in the record.

With respect to the positioning of the boundary line, the Commissioner's report, as adopted by the trial court, stated, in relevant part, as follows:

1. The Commissioner hereby adopts the report of Phil Biggs as the findings of this Court in regards to the chain of title and the descriptions contained in said Deed as if fully set out herein and is made a part hereof.

2. The Defendants Frasure cannot be the owner of said property since the description contained in his [sic] Deed is not an accurate description of the property originally conveyed to his [sic] predecessors in title. The Deed conveying the property to the Plaintiffs contains the description which is an accurate description of the property conveyed to the Plaintiffs' predecessors in title and therefore the Plaintiffs are the owners of said property by Deed.

CR 52.01 requires the trial court, in all actions tried upon the facts without a jury, to find the facts specifically and state separately its conclusions of law. In this case, the trial court's findings consist largely - if not entirely - of certain findings contained in Phil Biggs's chain of title report. The report prepared by Phil Biggs is not included in the appellate court record. The omission of the report hampers our review of the trial court's decision in this case. The burden was upon the Frasures to ensure that the Biggs report was included in the

appellate record. Burberry v. Bridges, Ky., 427 S.W.2d 583, 585 (1968). "In the absence of the evidence in the record, we must presume that the judgment of the trial court was supported by the evidence." Miller v. Com., Dept. of Highways, Ky., 487 S.W.2d 931, 933 (1972).

However, despite the Frasures' fault in failing to ensure that the Biggs report was contained in the appellate record and our presumption that the report supports the trial court's decision, we note that the trial court adopted the Biggs report as its findings, as reflected in paragraph one of the Commissioner's report, only with respect to the chain of title and the deed descriptions. It follows that the trial court did not adopt as a finding any opinion expressed in the Biggs report regarding whether the Wells deed description encompassed the disputed property. For this reason, we conclude that the findings of the trial court do not include a finding that the description contained in the Wells deed encompasses the disputed property.<sup>2</sup>

In addition to the above deficiency, the trial court's conclusions of law as set forth in paragraph two of the Commissioner's report do not correctly apply Kentucky trespass

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<sup>2</sup> Attached as an exhibit to the deposition testimony of Bobby Wells is a survey prepared by Phillip Biggs of Diamond Engineering at the request of the Wellses. The survey reflects that the disputed property belongs to the Wellses. We have no way of knowing whether the survey was incorporated into the Biggs report. If it was, again, the trial court's adoption of the Biggs report as its findings was limited to the chain of title and deed descriptions. The trial court did not purport to adopt any survey included within the report, nor does it otherwise adopt or refer to the Biggs survey.

and quiet title law. A party plaintiff asserting title to property has the burden of demonstrating the strength of his own title and may not prevail merely by pointing out weaknesses in the title of his adversary. Coleman Mining Co. v. McClanahan, Ky., 237 S.W.2d 543 (1951); Stewart Lumber Co. v. Fields, Ky., 445 S.W.2d 140, 142 (1969). "It is well settled that in an action for trespass on land, where the title to the land is put into issue, the plaintiff must recover on the strength of his own title." Burchfield v. Ping, Ky., 284 S.W.2d 818, 820 (1955) (citing French v. Childers, 280 Ky. 339, 133 S.W.2d 63 [1939]). Moreover, the claimant to the property "has the burden of showing that the land in dispute is embraced within his boundary lines, which he must locate with persuasive certainty." Stewart Lumber, supra at 142.

Implicit in the trial court's conclusions of law as set forth in paragraph two of the Commissioner's report is a reliance upon the weakness of Anthony Frasure's title in concluding that the Wellses were the owners of the property and that the Frasures were guilty of trespass. Moreover, the Commissioner's statement "[t]he Deed conveying the property to the Plaintiffs contains the description which is an accurate description of the property conveyed to the Plaintiffs' predecessors in title and therefore the Plaintiffs are the owners of said property by Deed" is a fallacious conclusion. The statement would only be true if the "accurate description" included the disputed property within its boundaries.

In summary, (1) the trial court failed to make a finding that the description contained in the Wells deed includes the disputed property, and (2) the trial court's conclusion that the Wellses are the owners of the disputed property is premised upon an erroneous application of quiet title law. Absent a proper determination that the Wellses are the owners of the disputed property, the Frasures cannot be held liable for trespass to the property. See Garrett v. Young, Ky., 423 S.W.2d 526 (1968) (cause for damages based on trespass must fail in absence of proof of trespass). We therefore reverse the judgment of the trial court insofar as it quieted title in favor of the Wellses and concluded that the Frasures were liable for trespass and remand for additional proceedings. In its decision following remand, the trial court shall comply with CR 52.01 and set forth adequate findings of fact and conclusions of law supporting its decision.

Next, the Frasures contend that the trial court applied an incorrect measure of damages by ordering the Frasures to pay the Wellses' attorney fees, surveyor costs, and court costs as damages for an unintentional trespass. We agree.

It is apparent that the Wellses' theory of the case was that the injury caused by appellants' trespass was a temporary, as opposed to a permanent, injury. If the injury to property caused by the trespass is temporary, the appropriate award of damages is the cost to return the property to its original state. Ellison v. R & B Contracting Inc., Ky., 32 S.W.3d 66, 69 (2000). However, it is now clear that the reduction in the fair market

value of the property caused by the trespass serves as a cap on the amount the land owner may recover. Id. at 70.

Pursuant to Ellison, attorney fees, surveyor costs, and court costs are not appropriate damages to be awarded for trespass. On remand, if the trial court again determines that the Wellses are the owners of the property and that the Frasures are liable for trespass, it should award damages consistent with Ellison, supra.

The judgment of the Boyd Circuit Court is reversed, and the case is remanded for additional proceedings consistent with this opinion.

ALL CONCUR.

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